

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



# 76-1008

To be argued by  
MAX WILD

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UNITED STATES COURT OF APPEALS

*for the*

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

-against-

FRANK ALTESE et al,

Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

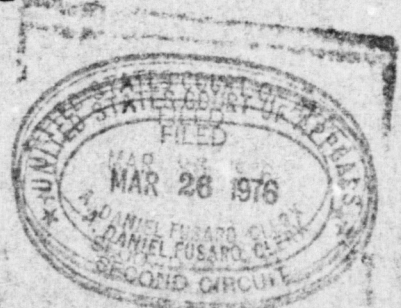
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BRIEF FOR APPELLEE  
JAMES V. NAPOLI, SR.

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IN THE UNITED STATES COURT OF APPEALS  
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No. 76-1008

UNITED STATES OF AMERICA,

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v.

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
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BRIEF FOR APPELLEE,  
JAMES V. NAPOLI, SR.

QUESTION PRESENTED

Whether the district court correctly held, based upon the Organized Crime Control Act of 1970 (the "Act") and its legislative history, that Title IX of the Act (§ 1962)

did not proscribe per se the operation of a large-scale, illegal, continuous interstate gambling business, as defined and proscribed in Title VIII of the Act (§ 1955) under which each of the defendants were also indicted. (A. 19-22).\*

### STATEMENT OF THE CASE

#### Preliminary Statement

On the motion of James V. Napoli, Sr., Chief Judge Mishler dismissed four of the six counts against him and the other defendants named therein. Since the government consented to the dismissal of two of those counts, its appeal is limited to the dismissal of the other two, Counts One and Two.

It is undisputed that facts alleged in support of the entire indictment are that numerous individuals were engaged in a large-scale, illegal, continuous, interstate numbers operation, which is specifically outlawed by Title VIII, the anti-gambling provision of

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\* Except where otherwise noted, references in the form "§ \_\_\_\_\_" refer to Title 18 of the United States Code. References in the form "A \_\_\_\_\_" refer to the government's Appendix. References in the form "G. Br. \_\_\_\_\_" refer to the government's opening Brief on this appeal.

the Organized Crime Control Act of 1970 (the "Act"), specifically § 1955. The remaining counts against Mr. Napoli and the others charge, in the bare bones of the statute, three substantive violations of § 1955 (Counts Three, Four and Five) and a conspiracy to violate that statute in violation of the general conspiracy statute, § 371 (Count Eight). Counts One and Two which Chief Judge Mishler dismissed, were an attempt to recaste the alleged gambling activities so as to bring them within the proscription of the anti-infiltration statute (Title IX of the Act) as a substantive violation of § 1962(c) (Count One) and a conspiracy to violate that statute in violation of § 1962(d) (Count Two).

Thus, the dismissal of Counts One and Two has not removed any defendant from the case, which is now scheduled for trial, estimated to consume approximately four to six weeks, commencing on July 6, 1976, in which each of the defendants is subject to a maximum jail sentence of at least 10 years and substantial fines. As a practical matter a conviction would accomplish all

prosecutive goals. Clearly, this appeal is an academic exercise, an unnecessary encroachment upon this Court's valuable time, and perhaps an attempt to divert appellees' attorneys from preparation for a major trial.

PROCEEDINGS BELOW:

1. The Indictment

The government, following its often criticized practice of mass conspiracy indictments and duplication of counts based on the same alleged conduct, secured an indictment charging twenty-two individuals as defendants and at least thirty-seven individuals as unindicted co-conspirators. An examination of the indictment reflects that the wrong-doing alleged was engaging in an illegal interstate numbers operation.\*

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\* Count Seven, dismissed with the government's consent also charged obstruction of justice respecting one of the accomplices. Although the court below ruled only that this count was insufficient, Mr. Napoli also sought dismissal on the ground that an accomplice was not within the protection of § 1510 and, therefore, the count failed to charge a crime. United States v. Cameron, 460 F.2d 1394, 1402 (5th Cir. 1972). (Napoli's Opening Brief below pp. 4-8).

Counts Three, Four and Five, which remain charge substantive violations of the anti-gambling statute, 18 U.S.C. § 1955. Count Six, also dismissed with the government's consent, charged interstate travel in connection with said gambling operation. Count Eight, also to be tried, charges a conspiracy under § 371 to violate the anti-gambling statute, § 1955.

Count One charged a substantive violation of the anti-infiltration statute, § 1962(c) and Count Two charged a conspiracy under § 1962(d) to violate § 1962(c). Counts One and Two attempted to achieve this result by recasting the gamblers into an "enterprise" as defined by an unspecified clause in § 1961(4) and by alleging that their gambling activities constituted a "pattern of racketeering" and the "collection of unlawful debts" (A.6-11).\*

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\*Appellee Napoli challenged the sufficiency of these counts on the ground, inter alia, that the indictment failed to sufficiently apprise him of the manner in which he and the other defendants constituted an "enterprise". Napoli's Brief below, pp. 50-51, 64; cf United States v. Heinze, 361 F. Supp. 46, 50-51, 56 (D. Del 1973). Chief Judge Mishler did not reach this point, since he held the conduct alleged did not fall within the proscription of Title IX of the Act of which § 1962 was an integral part (A. 25).

## 2. The Motion Below

### a. Appellee's moving brief:

Mr. Napoli's opening brief below urged dismissal of Counts One and Two because, inter alia, the conduct attempted to be charged therein was not within the purview of § 1962(c) or (d).<sup>\*</sup> He showed that the Act was a comprehensive legislative scheme designed to combat organized crime in each of its aspects. His brief established by reference to the Act and its legislative history, that Congress had not intended to include within § 1962 (c) or (d) the illegal operation of a business which had been unlawful from its inception. After establishing the Act's framework by reference to its Twelve Titles, he compared the legislative history of the anti-gambling portion, Title VIII of which § 1955 was an integral part, to that of the anti-infiltration provisions of Title IX,

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<sup>\*</sup> Mr. Napoli urged further bases for dismissal not passed upon below because of the dismissal on the grounds at bar (A.25).

of which § 1962 was an essential part. He showed, by analysis of the scope and purpose of each of those provisions, as viewed by the Judiciary Committees of both the Senate and the House in their reports on their final bills, as well as the positions taken by the Departments of Justice and Treasury, that § 1962 had as its goal the protection of legitimate business from unlawful takeover and operation.

Mr. Napoli anticipated the government's reliance upon United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975), which he demonstrated had been wrongly decided. In that connection he showed that the Cappetto decision was bottomed upon the Seventh Circuit's analysis of the portion of the Senate Judiciary Committee's report relating to the scope and purpose of § 1955 (the anti-gambling statute) not the scope and purpose of § 1962. He further showed that the Seventh Circuit's reliance upon United States v. Parness, 503 F.2d 403 (2d Cir. 1974) was likewise misplaced, because Parness did not pass upon the issue of whether an illegal business was included with the definition of an "enterprise" in § 1961.

b. The government's opposition:

The government contended below that:

- (1) the language of the statute supported the indictment under § 1962(c) and (d);
- (2) it was improper to consider legislative history; and
- (3) United States v. Cappetto, supra, although quoting at length from an inapposite portion of legislative history, was really based upon an analysis of the statute and should be followed.

c. Appellee's reply:

Appellee's reply brief showed that if § 1962(c) were read in con- with the balance of that section, it was clear that it had no application to the illegal operation of a business unlawful from its inception. Appellee further showed that references to the Act's legislative history was appropriate. Finally, appellee again demonstrated that Cappetto, supra, was wrongly decided and should not be followed.

### 3. Chief Judge Mishler's Opinion

After a lengthy consideration of the papers, Chief Judge Mishler wrote a brief incisive opinion dismissing Counts One and Two on the ground that Title IX "deals with the problem of infiltration of legitimate business . . . . [an] allegation [not] in this indictment . . . ." (A.19). Chief Judge Mishler reached this conclusion "from a reading of the statute and from the legislative history . . . ." (Ibid.)

Chief Judge Mishler supported his decision by an analysis of both the Act, especially Titles VIII (anti-gambling) and Title IX (anti-filtration), and its legislative history (A.20-21). He rejected United States v. Cappetto, supra, because that

"court erroneously cited legislative language which was intended to explain § 1955 not § 1962. 502 F.2d at 1358" (A.21)

He likewise rejected the original decision in United States v. Castellano (E.D.N.Y., decided November 11, 1975), which the prosecution called to his attention, because "that decision relied upon Cappetto, supra." (A.21). It should

be noted that although it must have been aware of Judge Newman's contrary decision in United States v. Moeller, 402 F. Supp. 49 (D. Conn 1975), which was decided on October 7, 1975, over one month before the original decision in Castellano, supra, it did not call that case to his attention.\*

Chief Judge Mishler held that this Court's decision in United States v. Parness, 503 F.2d 403 (2d Cir. 1974) was inapposite to the issue before him, because it

"merely held that 'enterprise' should be construed to include foreign as well as domestic businesses. That case did not consider whether 'enterprise', as used in § 1962, includes illegal as well as legitimate business operations." (A.21).

He further held that

"the better view was expressed in United States v. Amato, 367 F. Supp. 547 (S.D.N.Y. 1973), which held that

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\* Annexed hereto as Exhibit "A" is a copy of the government's letter to Chief Judge Mishler forwarding a copy of the Castellano decision of November 11, 1975. It makes no mention of United States v. Moeller.

§ 1962 'makes it unlawful to invest the proceeds of racketeering in legitimate business, and § 1962(d) makes it unlawful for any person to conspire to violate any provision of § 1962.' 367 F. Supp. at 549." (Ibid.)

Chief Judge Mishler held that it was appropriate for him "to look to the legislative history for statutory interpretation in the absence of significant case law." (A.21) He held that the legislative history, clearly established that Congress intended in Title IX only to protect legitimate business from infiltration (A.19, 22).

### ARGUMENT

THE COURT BELOW CORRECTLY HELD THAT AN ALLEGEDLY LARGE-SCALE, ILLEGAL, CONTINUOUS INTERSTATE GAMBLING BUSINESS, SPECIFICALLY OUTLAWED UNDER TITLE VIII (§ 1955), WAS NOT A PROTECTED ENTERPRISE UNDER TITLE IX (§§ 1961 and 1962) OF THE ACT AND THEREFORE ITS OPERATION DID NOT CONSTITUTE A PER SE VIOLATION OF § 1962(c)

#### A. The Act Is A Comprehensive Plan.

The Organized Crime Control Act of 1970 (the "Act") is a comprehensive plan to deal with all aspects of organized crime, both procedural and substantive. Each of the Act's twelve Titles is addressed to a specific aspect of this general purpose:

Title I establishes special grand juries to sit in major population centers or in other areas where organized criminal activity may take place.

Title II provides a general federal immunity statute designed effectively to displace the privilege against self-incrimination.

Title III codifies present civil contempt practices with respect to recalcitrant witnesses in federal grand jury and court proceedings.

Title IV facilitates federal perjury prosecutions while at the same time permitting recantation to be a bar to prosecution in order to induce subsequent truthful testimony.

Title V authorizes the Attorney General to protect and maintain federal or state organized crime witnesses and their families.

Title VI gives the government an equal right with defendants to preserve testimony by the use of depositions in a criminal proceeding.

Title VII seeks to limit disclosure of information illegally obtained by the government to defendants who seek to challenge its admissibility, or that of other evidence allegedly tainted therefrom.

Title VIII first sets forth special findings dealing with the effect of "syndicated gambling" on interstate commerce, and proceeds to create new federal offenses involving "illegal gambling businesses".

Title IX creates an entirely new chapter in Title 18, entitled "Racketeer Influenced and Corrupt Organizations." Both procedural and substantive, it prohibits the acquisition, control or conduct of enterprises engaged in interstate commerce through the money or methods of organized crime. Providing imprisonment, fines, and forfeiture as criminal penalties, it also authorizes civil treble-damage suits by injured private parties, and civil process orders of divestment, prohibition of business activity, and dissolution or reorganization.

Title X authorizes extended sentences of up to 25 years for dangerous adult "special offenders",

Title XI establishes federal controls over interstate and foreign commerce in explosives.

Title XII establishes a National Commission on Individual Rights to conduct a comprehensive study and review of federal laws and practices relating to criminal procedures authorized under this act and others. H.R. Rep. No. 1549, U.S. Code Cong. & Admin. News, 4007-12, 1st Cong., 2d Sess., (1970) ("House Rep.")\*

An analysis of the Act, particularly comparing Title VIII (the anti-gambling title) with Title IX (the anti-infiltration title), both alone and against the Act's legislative history, makes it abundantly clear that § 1962 has no application in the absence of the infiltration of a legitimate business.

- B. The general interpretative language relied upon by the government does not assist in determining what Congress intended in this particular case.

The government contends that the preface to the Act, to the effect that it was aimed at "the eradication of organized crime" and that it was to be construed "to effectuate its remedial purposes", requires a holding that the establishment and running of a large-scale,

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\* All citations to the House Report are to the pages in 2 U.S. Code Cong. & Admin. News (1970).

illegal, continuous, interstate gambling operation is proscribed by § 1962(c) (G.Br. 26, 18). These general legislative prefatory remarks, not codified in Title 18 of the United States Code, do not support the government's contention.

In Bissette v. Colonial Mortgage Corp. of D.C., 477 F.2d 1245, 1246-47 (D.C. Cir. 1973), the appellant contended for a statutory construction also based upon the argument that the statute was "remedial" and "should be liberally construed". The Court rejected the appeal, holding:

"'liberal construction' and interpretation based on legislative purpose can only go so far. Where the meaning of the statute . . . is clear, a contrary reading would become destruction of the statutory scheme . . ."  
(Id at 1247).

As the Supreme Court reaffirmed only last year:

"It has long been a 'familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.' Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)."  
Muniz v. Hoffman, U.S. , , 95 S.Ct. 2178, 2187 (1975).

Thus, the inquiry is what did Congress intend by the particular provisions at issue. General admonitions of statutory construction have force only when the Congressional goal of a particular statutory provision is ascertained.

C. The word "enterprise" is limited to legitimate business and commercial ventures.

Section 1961 (4) defines enterprise as:

"any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity".\*

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\*The indictment did not specify under which phrase of this definition the defendants were charged. Accordingly, believing that the indictment was insufficient for failure to apprise him adequately of the charge against which he had to defend, Mr. Napoli sought dismissal of Counts One and Two relying on Heinze v. United States, 361 F. Supp. 46, 50-51, 56 (D.Del. 1973). Napoli's Opening Brief below, pp. 50-51, 64. Chief Judge Mishler did not reach this issue because of the broader grounds upon which he dismissed these counts.

Although the indictment does not identify the phrase under which the defendants are charged with constituting an enterprise, the government's bill of particulars specified that the phrase upon which the defendants were charged was that they were a "group of individuals associated in fact although not a legal entity".\* The government contends that the above phrase must be read broadly to effectuate the remedial purpose of the Act, so as to include large-scale, illegal, interstate, continuous gambling businesses such as those defined in § 1955, under which all of the defendants were, and still are, charged with substantive and conspiratorial violation (Counts Three through Five and Eight). The government's contention is without merit.

It has long been settled that "specific terms prevail over general in the same or another statute which

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\* This is consistent with the government's position on this appeal. See, e.g., G. Br. 12.

otherwise might be controlling." D. Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1932). It is an equally clear maxim of statutory construction that:

"where general words follow an enumeration of persons or things described by words of specific meaning, such general words are construed to apply only to persons or things of the same kind or class as those specifically mentioned".  
In re Weaver, 339 F. Supp. 961, 962-63(D. Conn. 1972)

In short, the meaning of a particular statutory word or phrase should be ascertained from the context in which it appears and the other words and phrases associated with it.

Here it is clear that the general catch-all phrase at the end of the definition of "enterprise" refers only to legitimate informal organizations of workers. This can readily be seen if the definition is separated into its constituent parts.

The first part of the definition is addressed to all of the forms in which lawful businesses can be conducted. First the definition identifies specific forms

of business organizations:

"any individual [sole proprietorship],  
partnership, corporation, association".

Then it includes a general catch-all, "or any other legal entity". (emphasis added). Next the definition switches from the management side of the picture to that of legitimate organized labor. Following the word "entity" is a comma, which is followed by "and any union" (emphasis added). Immediately thereafter comes the concluding general catch-all "or any group of individuals associated in fact although not a legal entity" (emphasis added).

Thus, in the context used, the concluding phrase has reference only to legitimate organizations of employees which are less formal in structure than chartered unions.\*

This interpretation is the only one which comports with the foregoing rules of statutory construction.

In sum the definition of enterprise encompasses all legitimate forms of business and labor organizations.

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\* The legislative history fully supports this interpretation. After discussing the purposes of Title IX relating to legitimate businesses under the headings "SUBVERSION OF LEGITIMATE ORGANIZATIONS", the Senate Judiciary Committee turned to "TAKEOVER OF LEGITIMATE UNIONS", stating in relevant part:

"Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate unions. . . .  
(footnote continued on following page)

It would defy reason and logic to suggest that this is not the broad definition which this Court held Congress intended. United States v. Parness, 503 F.2d 430, 439 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975)

The government contends that the phrase at issue reaches even illegal associations. In light of the fact that each specific form of business and labor association enumerated in § 1961 (4) was, as the Senate Report quoted in the footnote confirms, a lawful form of organization, the government's desired interpretation runs afoul of the above-quoted rule of construction which states that:

"general words are construed to apply only to persons or things of the same kind or class as those specifically mentioned."

In re Weaver, supra, 339 F.Supp. at 962-63.

Both Chief Judge Mishler and Judge Newman independently agreed that Parness did not deal with the question of whether "enterprise" included illegitimate businesses. They held that Parness merely held that foreign corporations were included within the meaning of the word "corporation" as used in defining the word "enterprise".A.21; Moeller, supra, 402 F. Supp. at 60.

(footnote continued from preceding page)

As the takeover of organized crime cannot be tolerated in legitimate business, so, too it cannot be tolerated here." S. Rept. 91-617, pp. 76-78 (1969)

The discussion of Title IX in the Senate Report is limited to describing Congress' decision to protect legitimate business and legitimate labor organizations.

Both Judges independently rejected United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975), upon which the government relies heavily. Their rejection of Cappetto was partially for its misplaced reliance on Parness and partly because it relied on the legislative history explaining the scope and purpose of § 1955 rather than § 1962. A.21; 402 F. Supp. at 60.\* In explaining the definition of "enterprise", the Senate Judiciary Committee confirmed the accuracy of the interpretation below, stating that it included:

"associations in fact, as well as legally recognized associative entities. Thus, infiltration of any associative group by any individual or group capable of holding a property interest can be reached." S. Rept. 91-617, p. 158 (1969).

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\* Both decisions by Judge Bartels upon which the government also relies are predicated upon the validity of Cappetto. A. 33-34, 44-45.

Judge Newman stated:

"I conclude that 'enterprise' means what the Senate Report says - legitimate activity".  
402 F. Supp. at 60.\*

- D. The acts prohibited by § 1962 establish that Title IX was not aimed at illegitimate activities unless they impacted upon a lawful business or commercial activity

The prohibited acts enumerated in § 1962 further establish that Title IX was never intended to outlaw the per se operation of a business, illegal from its inception. Rather it was designed only to protect legitimate business from specified illegal conduct.

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\* Even if, arguendo, there were no statutory ambiguity, legislative history should be used as an interpretative aid.

"When aid to construction of the meaning of words, as used in the statute is available, there is certainly no 'rule of law' which forbids its [legislative history's] use, however clear the words may appear on 'superficial examination'".  
United States v. American Trucking Ass'ns.,  
310 U.S. 534, 543-44 (1940) (footnotes omitted).

Section 1962 enumerates three types of prohibited activities, plus a conspiracy to do any prohibited act:

- (1) It prohibits the purchase of a significant interest in an "enterprise" with the proceeds of income derived "from a pattern of racketeering activity or through collection of an unlawful debt" (§ 1962 (a));
- (2) It prohibits the acquisition of an "enterprise" "through a pattern of racketeering activity or through a collection of an unlawful debt" (§ 1962 (b)); and
- (3) It prohibits anyone "employed by or associated with an enterprise" from participating "in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt". (§ 1962 (c)).\*

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\* A "pattern of racketeering activity" includes, among a

(footnote continued on following page)

Read in context, the prohibited acts establish that Congress' only aim in § 1962 was to protect legitimate commercial endeavors. The first two prohibited acts (§ 1962 (a) and (b)), are aimed at preventing infiltration, either by use of the fruits of specified wrong-doing or using such techniques themselves. These provisions were obviously designed to prevent those involved in organized crime from acquiring control of legitimate businesses and other lawful commercial endeavors, regardless of their form of organization. The third prohibited act [§ 1962 (c)], operating an enterprise in an unlawful manner, is clearly aimed only at protecting legitimate commercial organizations from being harmed by a corrupted one, e.g., unfair competition through threats, unlawful gambling or bribery. \*

It defies reason to conclude, merely because § 1962 did not qualify the word "lawful", that Congress intended § 1962 to attack a business illegitimate from

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(footnote continued from preceding page)

large variety of felonies, engaging in large-scale, illegal interstate gambling business in violation of § 1955, § 1961 (1) and (5).

\*This is confirmed by the legislative history quoted particularly page 48.

its inception and always operated in violation of law. Read in context, it is clear that Congress' sole concern in Title IX was the protection of legitimate business and worker activity from specified unlawful practices. Moeller, supra, 402 F. Supp. at 59.

Since, as shown in the previous subpoint, "enterprise", as defined in § 1961 (4), included only legitimate businesses or labor organizations, it was unnecessary to qualify "enterprise" with the word "lawful" in any of the acts prohibited by § 1962. Indeed, such a qualification would have been redundant.

It seems too clear to be seriously disputed that Congress had no desire to protect unlawful activities. But that would be the result if "enterprise" were defined in the way the government contends. For example, the acquisition of an unlawful business, either with the fruit of proscribed conduct or by that conduct itself, would constitute a violation of § 1962, thus protecting the unlawful business from interference by other racketeers.

The absurdity of the government's position is underscored by rewriting § 1962 (c) to substitute "illegal gambling business", a "Racketeering Activity" under § 1961 (1), for the word "enterprise":

"It shall be unlawful for any person employed by or associated with any illegal gambling business engaged in or the affairs of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such illegal gambling business' affairs through at least two acts of unlawful gambling or collection of any gambling debt." \*

It is clear that Congress, by including illegal gambling (§ 1955) within the definition of "Racketeering Activity", was saying only that gambling income and techniques could not be used to infiltrate or corrupt a legitimate business activity.\*\*

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\* This absurdity is made even more evident when one remembers that the "illegal gambling business" which Congress sought to reach in § 1955 "involves a wide-spread use of, and has an effect upon interstate commerce and the facilities of interstate commerce". House Rep. 4028.

\*\* The legislative history quoted infra at pp. 48-49, fully confirms the obvious conclusion.

E. The existence of Title VIII, which is specifically aimed at stopping large-scale, illegal, interstate continuous gambling businesses, negates the government's contention that such businesses are outlawed by Title IX.

Section 1955 is an integral part of Title VIII. It outlaws large-scale interstate gambling operations, such as that alleged in the indictment. It authorizes five year jail terms and forfeiture of "any property, including money, used in violation" thereof. § 1955 (a) and (d). Section 1955 (b) defines an "illegal gambling business" as follows:

"(1) illegal gambling business" means a gambling business which -

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day."

The very existence of Title VIII, which is limited to and deals in detail with, large-scale, illegal, interstate gambling operations of a continuing nature, would be virtually superfluous if Congress intended to encompass such operations within the general catch-all portion of enterprise, i.e., a "group of persons associated in fact although not a legal entity."

"However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . .'" Fourco Glass Company v. Transmirra Corp., 353 U.S. 222, 228 (1957). As Judge Newman observed, the construction sought by the government "' would alter sensitive federal-state relationships' or 'transform relatively minor offenses into federal felonies'".

United States v. Moeller, supra, 402 F. Supp. at 59.

He continued:

"If 'enterprise' in § 1962 (c) includes unlawful ventures, then the statute could be used to prosecute any unlawful activity

that affected interstate commerce so long as the participants in the activity committed two acts within the broad definition of racketeering activity. Congress may have the power to extend federal criminal jurisdiction that fall into areas normally handled by the states, but it should take a clear indication of legislative intention before such a sweeping purpose is attributed to it.

The hazards of such a broad interpretation are highlighted by comparing its consequences with Title VIII of the Act. In that title, Congress extended federal criminal authority into the area of gambling, but did so under strict limitations. The illegal gambling businesses proscribed by Title VIII are only those that involve five or more persons and remain in substantially continuous operation for more than thirty days or have a gross revenue of \$2,000 in a single day. 18 U.S.C. § 1955(a). If § 1862(c) were interpreted to include unlawful activities, the limitations of § 1955 could easily be circumvented. A federal prosecution could be brought against any gambling enterprise with any effect on interstate commerce whenever the operators committed two acts in violation of any state gambling statutes. Congress could not have enacted minimum criteria in Title VIII for number of participants and scope of gambling activity and then intended Title IX to be used to prosecute gambling activities that fall short of these criteria". (Id. at 59-60).

It is fitting to add to Judge Newman's analysis the fact that two gambling violations, each of which may, under state law, carry relatively short jail terms, would subject the defendant to an additional term of twenty years under Title IX. Moreover, the forfeiture provisions under § 1955 are in many respects identical to those provided for in Title IX.

Judge Newman properly expressed a deep concern for maintaining the federal-state relationship, clearly recognized by Congress in narrowly limiting the types of gambling activities which could be prosecuted per se by the federal government.\* He foresaw the possibility of circumventing Title VIII if "enterprise", as used in Title IX, included illegal businesses. The prosecutorial evils that Judge Newman prophesied have come to pass here. The acts of racketeering upon which the first two counts were predicated were part of the alleged continuing gambling activities and constituted misdemeanors and class E felonies, the lowest level felony under New York law. (A.7-8). Thus, the prosecution here is

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\* "Thus, the legislation would in practice not apply  
(footnote continued on following page)

attempting to bootstrap itself from the same alleged conduct, relatively minor crimes under state law, to violations of § 1955 carrying five year sentences to two violations of § 1962 which subjects the defendant to maximum terms of 40 years. It is inconceivable that Congress could have ever intended this result.

Thus, a comparison of Title VIII and IX clearly establishes that an unlawful business was not intended to be encompassed within the catch-all phrase ending the definition of "enterprise".\* \*

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\*(footnote continued from preceding page)

to gambling that is sporadic or of insignificant monetary proportions. It will reach only those who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be a matter of national concern." S. Rept. supra at 73. (emphasis added).

\*\* The use of "enterprise" interchangeably as a statutorily defined term and a generic term (Compare Paragraphs I, II and III with Paragraph III A 1 and 2 [A.6-8]), further supports Judge Mishler's decision.

F. The legislative history relating to Titles VIII and IX of the Act clearly establishes that § 1962 does not proscribe the per se operation of an unlawful business.

Chief Judge Mishler, after studying the Act's legislative history, quoted several highly pertinent portions of the committee reports he had studied and held that:

"the relevant legislative reports indicate conclusively that § 1962 was intended to deal only with the very specific problem of infiltration of legitimate businesses by persons connected with organized crime." (A.22).

Judge Newman, only a few days earlier, independently reached an identical conclusion, also after his own examination of the relevant legislative history.

United States v. Moeller, supra, 402 F. Supp. at 58-60.

He stated (402 F. Supp. at 58):

"The legislative history . . . provides the clearest indication that Congress intended 'enterprise' to mean legitimate business."

Judge Newman's comprehensive opinion even went beyond the committee reports. He supported his holding from the debates reported in the Congressional Record, as well (402 F. Supp. at 58-59, fn 8):

"Nor is there one word in the House floor debates over the Organized Crime Control Act that would indicate that any member of Congress thought Title IX would reach anything but legitimate business."

Both Chief Judge Mishler and Judge Newman were clearly correct.

The legislative history of Titles VIII and IX reveals the clear differences in conduct each was aimed at and establishes beyond question that § 1962 has no application in the absence of an infiltration of a legitimate business, as the following comparison shows.

1. Title VIII

Congress premised its enactment of Title VIII in its belief that the then-existing federal statutes dealing with the interstate aspects of gambling were not broad enough to reach all aspects of large-scale illicit gambling "so continuous and so substantial as to be a matter of national concern." Sen. Rep. 91-617, 91st Cong., 1st Sess., 72-73 (1969). It then made a special finding that

"illegal gambling involves a widespread use of, and has an effect upon interstate commerce and the facilities of interstate commerce." House Rep. at 4028

Upon this jurisdictional basis, Congress enacted Title VIII, which includes 18 U.S. C. §1955. Congress graphically illustrated the type of activity it intended to be covered by §1955:

"Under existing legislation, many federal investigations of gambling operations end with no indictments because of the lack of evidence of an interstate element. For example, in Brooklyn, a long-term strike force investigation ended in the indictment of only three out of 20 suspects because of the absence of evidence of an interstate activity by the other 17. The three who

were indicted for violations of 18 United States Code, §1952, were involved with 17 others in running a multimillion-dollar gambling operation (horse bets and numbers) in the Eastern District of New York (Queens, Long Island and Brooklyn). The only interstate travel that could be proved was the travel of the three who were indicted from their homes in New Jersey to work in New York. The gambling operation itself involved no interstate travel and the other 17, who all lived in New York, cannot, therefore, be prosecuted federally despite their known participation in this huge gambling operation." Sen. Rep. at 72.

The similarity between the conduct described in this report and the conduct attempted to be charged in Counts One and Two is obvious.

Moreover, Congress has plainly stated:

"Title VIII deals only with those who are engaged in an illicit gambling business of major proportions.

It is anticipated that cases in which this standard can be met would ordinarily involve business-type gambling operations of considerably greater magnitude than this definition would indicate, however, because it is usually possible to prove only a relatively small proportion of the total operations of a gambling enterprise. Thus, the legislation would in practice not apply to gambling that is sporadic or of insignificant monetary proportions." Sen. Rep. at 73.

2. Title IX

In contrast to attacking illegal gambling business in Title VIII, Title IX (which includes 18 U.S.C. §1962) focuses on the infiltration of lawful businesses. The Senate Report plainly states that Title IX

"has as its purpose the elimination of infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." Sen. Rep. at 76. (emphasis added).

Similarly, the House Report states:

"§1962 establishes a three-fold prohibition aimed at stopping the infiltration of racketeers into legitimate organizations." House Rep. at 4033. (emphasis added).

That the prevention of infiltration of lawful businesses is the sole purpose of §1962 is emphasized by letters from the Department of Justice and the Treasury, respectively. The Justice Department wrote:

"I am submitting to you the Department's views on this bill's innovative approach to

the problem of racketeer infiltration of legitimate business.

\* \* \* \*

The Department favors the objectives of S.1861 [codified as 18 U.S.C. §§1961-68], and believes that...its combination of criminal penalties and civil remedies, which has been highly effective in removing and preventing harmful behavior in the field of trade and commerce, may be effectively utilized to remove the influence of organized crime from legitimate business." Letter from Richard G. Kleindienst to Hon. John L. McClellan, August 11, 1969, quoted in Sen. Rep. at 121. (emphasis added).

The Treasury Department wrote:

"Reference is made to your request for the views of [the Department of the Treasury] on S.1861...to prohibit the infiltration or management of legitimate organizations by racketeering activity or the proceeds of racketeering activity...." Letter from the General Counsel of the Treasury to Hon. James O. Eastland, August 11, 1969, quoted in Sen. Rep. at 126. (emphasis added).

The Department of Justice "was consulted in drafting" the Act. 116 Cong. Rec. 35, 295 (October 7, 1970)

Had it intended § 1962 to have application of unlawful businesses per se, it would have made that fact clear, both in the Act and its above-quoted letter.

In its section by section analysis of § 1962  
the Senate Judiciary Committee states in relevant part:

"Section 1962 establishes a threefold prohibition aimed at the infiltration of legitimate organizations.

Subsection (a) makes it unlawful to invest funds derived from a pattern of racketeering activity, as defined in section 1961 (1) and (5), or collection of unlawful debt as defined in section 1961(6) in any enterprise engaged in interstate or foreign commerce. The funds must have been derived by the investing party from activity in which he participated as a principal.

(Hearings at 405-6. See 18 U.S.C. §2; United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).) An exception has been provided for investment of funds where there is no resulting control in law or in fact to the investor. This provided for the possibility of 'legitimate investment' and draws a line of practical administration.

Subsection (b) prohibits acquisition or maintenance of an interest in an enterprise through the proscribed pattern or collection of unlawful debt. There is no one percent limitation here as in subsection (a) because (a) focuses on legitimate acquisition with illegitimate funds. Subsection (b) focuses on illegitimate acquisition through the proscribed pattern or collection. Consequently, any acquisition meeting this test is prohibited absolutely.

Subsection (c) prohibits the conduct of the enterprise through the prohibited pattern or collection. Again, there is no limitation on the prohibition."

S. Rep. at 159 (emphasis added)

Judge Newman holds that means precisely what it says, namely the "prohibition [is] aimed at the infiltration of legitimate organizations." Moeller, supra, 402 F. Supp. at 58. He states:

"The Report's discussion of Title IX repeatedly refers to 'legitimate organizations as the ones to be protected . . . and at no point remotely suggests that Title IX is intended to penalize investment in, acquiring, or conducting the affairs of unlawful enterprises.' (Id. at 59) (emphasis added).

Nevertheless, the government attempts to distort the Report's above-quoted section by section analysis of § 1962 by quoting only the portion analyzing subsections (b) and (c) and underscoring the absence of the "exemption" found in subsection (a). (G. Br. 28). When the Committee's entire analysis of § 1962 is read in context, it is clear that the language upon which the government seizes was aimed at explaining the "exception" in subsection (a) (which allows illegally obtained funds to be a "legitimate investment" "where there is no resulting control in law or in fact, to the investor"), from the use of illegal techniques,

either in obtaining control or in operating a business to the detriment of its legitimate competitors.

Contrary to the government's distorted contention, Congress simply was not aiming § 1962 at the per se operation of a business which was unlawful from its inception. Congress' aim in Title IX was clear and precise, namely the protection of the public from the economic suffering caused by infiltration and corruption of legitimate business and labor.

"When organized crime moves into a business, it customarily brings all the techniques of violence and intimidation which it uses in its illegal businesses. The effect of competitive or monopoly power attained this way is even more unwholesome than other monopolies because its position does not rest on economic superiority." S. Rep. at 76. "When the campaign [to infiltrate a legitimate business] is successful, the organization begins to exact a premium from its customers. Purchases are always made from specified allied firms. With its extensive infiltration of legitimate business, organized crime thus poses a new threat to the American economic system. The proper functioning of a free economy requires that

economic decisions be made by persons free to exercise their own judgment. Force or fear limits choice, ultimately reduces quality, and increases prices. . . . Competitors can then be effectively eliminated and customers can be effectively confined to sponsored suppliers." Id at 77.

'Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate unions. Control of labor supply through control of unions can prevent the unionization of some industries or can guarantee sweetheart contracts in others. It provides the opportunity for...extortion through the threat of economic pressure.... Trucking, construction, and waterfront entrepreneurs have been persuaded for labor peace to countenance gambling, loan sharking and pilferage.' Sen. Rep. Id. at 77-78 (emphasis added).

The report alphabetically lists 44 examples of legitimate commercial ventures which have been infiltrated and corrupted. Id at 76 - 77. At no point does it even hint that the per se operation of an "illegal gambling business" proscribed by § 1955 was ever within its contemplation. And, as Judge Newman found:

"Nor is there one word in the House floor debates over the Organized Crime

Control Act that would indicate that any member of Congress thought Title IX would reach anything but legitimate business" Moeller, supra, 402 F. Supp. at 58-59, fn 8.

If Congress intended to duplicate Title VIII's proscriptions in Title IX, it is truly Congress' best kept secret. Only by engaging in a process of surgical distortion of the Act, the Committee Reports and the floor debates, has the government even been able to argue that Title IX duplicated the proscription of Title VIII (§ 1955) against large-scale, continuous, interstate illegal gambling.\*

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\* It is settled that the carefully considered committee reports are entitled to more weight than floor debates in evaluating the meaning of a statute. United States v. Auto Workers, 352 U.S. 567, 585-86 (1957).

The government's patch work quilt of an argument disintegrates if the materials it quotes are read in context. For example, the preface to the Act (G.Br. 22-23, 26) merely says that organized crime is bad for our Country. To the extent that the government has quoted specific goals of Title IX it is clear that they deal only with Congress' finding that "this money and power are increasingly used to corrupt legitimate business and labor unions . . . . "

Senator McClellan's remarks (G.Br. 22-23) echo Act's concern. His statements as to the size of organized crime and the types of crimes in which it traditionally has been found were made in the context of his concern (at least so far as Title IX is involved) for preventing what he saw as its increased attempts "to subvert legitimate businesses and unions". Paul Curran's quoted testimony is to the same effect (G. Br. 28) Representative Clancy's greatest concern - indeed the Title to which he specifically referred was Title XI - was addressed to explosives and student uprisings. 116 Cong. Rec. 35205-06 (October 6, 1970). He also mentioned the enhanced punishment under the Act and expressed generalized support for the goals of the Act (G. Br. 26).

Senator Scott's remarks are also revealed by the Congressional Record to be merely generalized support for the Act not addressed to Title IX in particular as the government implies. (G. Br. 29).

The government has quoted brief portions of Congressman Poff's lengthy remarks out of context. (G. Br. 24). The general use of the word "enterprise" upon which the government seizes in the congressman's remarks were prefaced as follows:

"Mr. Chairman, perhaps the single most alarming aspect of the organized crime problem . . . has been the growing infestation of racketeers into legitimate business. This evil corruption must be stopped." 116 Cong. Rec. 35,295 (October 7, 1970).

Thus the government has omitted the very remarks which make clear what Congressman Poff later went on to develop using short-hand terminology. Judge Newman plainly believed that Congressman Poff's remarks were addressed only to infiltration and corruption of legitimate commercial activities. Moeller, supra, 402 F. Supp. at 59, fn 8 continued from 58. After quoting Congressman Poff, Judge

Newman stated (Ibid.):

"At least six other congressmen expressed the view that Title IX was intended to prevent the infiltration of legitimate businesses, and none ever discussed the statute in terms that might have contemplated the government's use of § 1962 in the present case [an activity illegal from its inception] 116 Cong. Rec. 35,196 (...Rep. Celler); id at 35,200 (...Rep. St. Germain); id. at 35,201 (...Rep. McCulloch); id. at 35,206 (...Rep. Kleppe); id. at 35,304 (...Rep. Railsback); id. at 35,319 (...Rep. Anderson); id. at 35,193 (... Rep. Poff).

The legislative history is replete with proof that Title IX has absolutely no application to the per se operation of an illegal gambling business:

1. "Title IX . . . seeks to stymie organized crime's growing infiltration of legitimate business." House Rep. p. 4081
2. The Senate's Report echoes the above stating (p.76):

"[Title IX] has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."

3. The Senate Report discusses Title IX under the following headings:

"SUBVERSION OF LEGITIMATE ORGANIZATIONS" (p. 76);

"INFILTRATION OF LEGITIMATE BUSINESS" (Ibid.); and

"TAKEOVER OF LEGITIMATE UNIONS" (p. 78).

4. The Senate debates 116 Cong. Rec. 585 states that Title IX

"Prohibits infiltration of legitimate organizations by racketeers or proceeds of racketeering where interstate commerce is affected."

5. After quoting the Justice Department letter addressed to Title IX, quoted earlier in this brief, Senator McClellan stated (Id. at 591-92)

"The infiltration of legitimate business by organized crime has been increasingly documented in the past year. Once it invades a legitimate field of endeavor, the mob quickly brings with it a full range of corrupt practices. . . .

Mr. President, Title IX is aimed at removing organized crime from our legitimate organizations."

"The first step in cleaning up an organization will be to require the mob to divest itself of its holdings in legitimate endeavors . . . .

...  
Mr. President, I am sure that there are some who are not aware of the extent of infiltration of our legitimate organizations by the mob. The facts, however, are truly disturbing."

6. Senator Hruska stated (Id. at 602):

"Mr. Hruska: Mr. President, the second substantive provision of this act is contained in title IX, Racketeer Influenced and Corrupt Organizations. This title contains a rather novel, and in my opinion, a most promising and ingenious proposal for crippling organized crime's relatively recent, but spectacularly successful, emergence into the field of legitimate business and unions."

"Title IX of this act is designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from control of legitimate businesses which have been acquired or operated by unlawful racketeering methods."

7. Senator Yarborough stated (Id. at 603):

"[Title IX,] Another commendable portion of the bill is designed to root out the influence of organized crime in legitimate business."

8. Senator Byrd stated (Id. at 607):

"Another section of the bill which merits special attention . . . is Title IX.

"Recent studies of the phenomenon of organized crime . . . have identified its alarming expansion into the field of legitimate business as a major threat to our institutions."

9. Senator Thurmond stated (Id. at 953):

"In this day and time, racketeers are very much interested in gaining inroads into legitimate business in order to set up "fronts" for their illegal operations. The committee has come up with a provision, designated as Title IX of §.30, which makes it possible to ferret out and expose such activities of criminals and their influence in supposedly legitimate businesses through the use of antitrust devices. This is an important provision of this legislation which will go a long way toward eliminating an avenue whereby the criminal element has disposed of its ill-gotten gains through legitimate business."

10. Congressman Celler stated (Id. at 35,196):

"Title IX is designed to inhibit the infiltration of legitimate business by organized crime."

11. Congressman Poff stated (Id. at 35,201):

"The racketeer organization category in Title IX is related to the gambling category. The money which the syndicate uses to infiltrate legitimate business enterprises comes largely from gambling receipts."

Congressman Poff stated (Id. at 35,295):

"Title IX of §.30 provided the machinery whereby the infiltration of racketeers into legitimate business can be stopped and the process can be reversed when such infiltration does occur."

12. Congressman Railsback stated (Id. at 35,304):

"This title is designed to deal with the infiltration of organized crime into legitimate business and labor. The title makes it a crime to use organized crime profits or methods to establish, acquire, or operate any legitimate business. It makes available antitrust case sanctions of a civil nature to remove organized crime from legitimate organizations."

13. Congressman Anderson stated (Id. at 35,319):

"Title IX is aimed at keeping organized crime out of legitimate business  
. . . . "

In sum, there is simply no support for the government's contention that Title IX has application to the per se operation of a large-scale, interstate, continuous gambling business.

Any conceivable doubt as to the correctness of the decision below is dispelled by the existence of the civil remedy provision of Title IX, which closely resembles the antitrust statutes.

"These civil remedies, says the Report, are 'broad remedial provisions for reform of corrupted organizations' [emphasis added,

cite omitted]. That comment can have reference only to a legitimate business corrupted by racketeering money or activity."  
Moeller, supra, 402 F. Supp. at 59.

The government relies upon Respass v. Commonwealth, 131 Ky. 87, 115 S.W. 1131, 1132 (1909), cited in a footnote to the Senate Report, as support for its thesis that § 1962 (c) was aimed at stopping the operation of an illegal gambling business (G. Br. 30). That case held merely that the owner of a house could be enjoined from allowing it to be used in such a way as to constitute a public nuisance. The house was apparently used for gambling and other illicit purposes and there were usually numerous disreputable characters hanging around it. The case offers no support for the government's contention. Indeed, the forfeiture provisions of § 1955, which offer a far more effective technique for deterring gambling, deprives the government's contention of any merit.

The government erroneously relies upon the Seventh Circuit's decision in United States v. Cappetto, supra, and two decisions in United States v. Castellano,

supra, both of which are based on Cappetto. Both were properly rejected as wrongly decided by Judge Mishler. Judge Newman rejected Cappetto, supra, for the same reasons. Castellano was decided after Moeller, supra.

The government further relies upon United States v. Campanale, 518 F.2d 352 (9th Cir. 1975). (G. Br. 16). That case clearly involved conduct specifically proscribed by § 1962. The Ninth Circuit held that, when the statute proscribed such conduct by "any person", it was unnecessary to establish that the defendant was a racketeer. That decision plainly has no application to the issue at bar.

#### CONCLUSION

For the foregoing reasons the judgment appealed from should be affirmed.

Respectfully submitted,

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## STATUTES INVOLVED

### § 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than \$20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of \$2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizures, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefits of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

Added Pub.L. 91-452, Title VIII, § 803(a), Oct. 15, 1970, 84 Stat. 937.

## CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Sec.

- 1961. Definitions.
- 1962. Prohibited racketeering activities.<sup>1</sup>
- 1963. Criminal penalties.
- 1964. Civil remedies.
- 1965. Venue and process.
- 1966. Expedition of actions.
- 1967. Evidence.
- 1968. Civil investigative demand.

<sup>1</sup> Analysis does not conform to section catchline.

### § 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18,

United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 941.

**§ 1962. Prohibited activities**

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942.

**§ 1963. Criminal penalties**

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.

#### § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.

Organized Crime Section  
Criminal Division  
Federal Building  
35 Tillary Street  
Room 327-A  
Brooklyn, New York 11201  
November 17, 1975

Honorable Jacob Mishler  
Chief United States District Judge  
Eastern District of New York  
United States Courthouse  
225 Cadman Plaza East  
Brooklyn, New York 11201

RE: United States v. Altesse, 75 CR 341

Dear Judge Mishler:

In connection with the pending motions to dismiss the various counts of the indictment in this case, enclosed is a copy of Judge Bartels' November 11, 1975 opinion in United States v. Castellano, et al, 75 CR 521, in which he held that Title 18, United States Code, Section 1962 applied to illegitimate as well as legitimate "enterprise".

Respectfully,

Fred F. Barlow  
Special Attorney

Enc.

FFB:gak

cc: Max Wild, Esq.  
Rubin, Baum, Levin, Constant and Friedman  
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New York, New York

EXHIBIT "A"

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Brief of Appellee James V. Napoli, Sr., have this day been mailed to counsel for the Government and counsel for the other Appellees at the following addresses:

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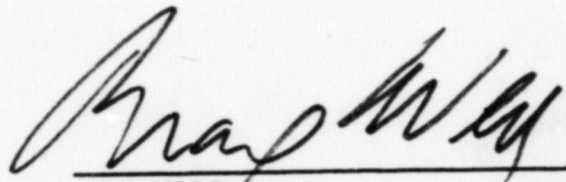
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Dated: March 26, 1976



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